

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,	}	NO. 2:15-CR-032-LRS
Plaintiff,		
v.		
SAMUEL GORDON LAVERDURE,	}	ORDER GRANTING 28 U.S.C. §2255 MOTION
Defendant.		

BEFORE THE COURT is the Defendant's 28 U.S.C. §2255 Motion (ECF No. 52). The Government has filed a response. (ECF No. 57). The motion is heard without oral argument.

A. TERM OF SUPERVISED RELEASE

In the binding Fed. R. Crim. P. 11(c)(1)(C) Plea Agreement (ECF No. 32), the Government and Defendant agreed to recommend Defendant serve a 14 months term of imprisonment and a two (2) year term of supervised release. Although the court imposed a 14 months term of imprisonment, it imposed a three (3) year term of supervised release. (ECF No. 43). Defendant's counsel did not object to the term of supervised release. Despite otherwise diligent representation of the defendant by counsel for the defense, this unfortunately constitutes ineffective assistance of counsel and is therefore, not subject to the

**ORDER GRANTING
28 U.S.C. §2255 MOTION-**

1 waiver of collateral attack rights set forth in Paragraph 17 of the Plea
2 Agreement.

3 When a defendant and the government enter into a Rule 11(c)(1)(C) plea
4 agreement setting forth a specific sentence, the district court may accept the
5 agreement or reject it, but “may not do so on a piecemeal basis.” *U.S. v.*
6 *Randock*, 330 Fed. Appx. 628 (2009), quoting *In re Morgan*, 506 F.3d 705, 709
7 (9th Cir. 2007). If the court accepts the agreement, it is bound by the agreed
8 upon recommendations. *Id.*, citing *United States v. Cervantes-Valencia*, 322
9 F.3d 1060, 1062 (9th Cir. 2003)(per curiam).

10 This court accepted the plea agreement. (ECF No. 47 at p. 10). As such,
11 it was bound to follow the recommendation of two (2) years supervised release.
12 Had the court rejected the plea agreement, it would have been obligated to give
13 Defendant an opportunity to withdraw his plea as specified in the Plea
14 Agreement (“Defendant will have the option to withdraw from this Plea
15 Agreement if the Court imposes a sentence harsher than agreed upon,” ECF No.
16 32 at Paragraph 2).

17 The portion of Defendant’s sentence related to his supervised release term
18 is **VACATED** and the court will direct entry of an Amended Judgment
19 reflecting Defendant’s supervised release term as two (2) years, not three (3)
20 years.

21 **B. FEDERAL SENTENCE TO RUN CONCURRENTLY OR**
22 **CONSECUTIVELY TO STATE COURT SENTENCE**

23 At the September 22, 2015 sentencing hearing, defense counsel informed
24 this court that her understanding was the State did not intend to proceed with
25 charges which had been filed in state court. (ECF No. 47 at p. 3). The
26 information received by defense counsel, however, turned out to not be

27 **ORDER GRANTING**

28 **28 U.S.C. §2255 MOTION-**

1 accurate. Accordingly, when this court sentenced Defendant for Escape From
2 Federal Custody, 18 U.S.C. §751(a), it did not consider whether it should make
3 his 14 months term of imprisonment concurrent or consecutive to the three (3)
4 months of imprisonment Defendant would eventually be sentenced to on the
5 state charge (money laundering) in Spokane County Superior Court Cause No.
6 15-1-01025-6.¹ The U.S. Supreme Court has held that federal district courts
7 have discretion to order that a federal sentence run consecutively to an
8 anticipated, but not-yet-imposed state sentence. *Setser v. United States*, _____
9 U.S. _____, 132 S.Ct. 1463, 1473 (2012). That means Defendant's federal
10 sentence could also have been made to run concurrently with the not-yet-
11 imposed state sentence, had this court known a state sentence would be
12 imposed.

13 Currently, Defendant's federal sentence is running consecutively to the
14 Spokane County Court sentence imposed on November 13, 2015. Multiple
15 terms of imprisonment imposed at different times run consecutively unless the
16 court orders that the terms are to run concurrently. 18 U.S.C. §3584(a).
17 Therefore, Defendant is not serving any of his state imposed time until the
18 conclusion of his federal sentence, currently projected to be June 15, 2016. If
19 this court had specified that his federal sentence was to run concurrently to his
20 anticipated, but not-yet-imposed Spokane County Superior Court sentence, then

21 1

22 An Information was filed on July 29, 2015 in Spokane County Superior
23 Court charging the Defendant with one count of Possession of a Controlled
24 Substance and one count of Identity Theft in the Second Degree. (ECF No. 52
25 at p. 10). An Amended Information was filed on November 13, 2015, charging
26 the Defendant with one count of money laundering. (ECF No. 52 at p. 12).
27 Defendant pled guilty to this Amended Information.

28 **ORDER GRANTING**

28 U.S.C. §2255 MOTION-

1 Defendant's state imposed time would have started running immediately on
2 November 13, 2015.

3 The state court money laundering charge for which Defendant was
4 convicted pertains to conduct which occurred on March 13, 2015, subsequent to
5 his escape from federal custody on January 23, 2015. (ECF No. 52 at p. 12). It
6 is distinct criminal conduct which occurred because Defendant escaped from
7 federal custody. As such, it should be punished separately. Accordingly,
8 pursuant to 18 U.S.C. §3584(b), and considering the factors set forth in 18
9 U.S.C. §3553(a), the court exercises its discretion to run Defendant's federal
10 sentence consecutively to his state court sentence.

11 **C. CREDIT FOR TIME SERVED IN FEDERAL CUSTODY**

12 Defendant has not received credit for time served in federal custody from
13 March 14, 2015 to June 10, 2015 (88 days). Counsel says she has confirmed
14 with the U.S. Marshal Service that Defendant was arrested on March 14, 2015
15 and transferred to state custody on September 23, 2015 (following his
16 sentencing in federal court). U.S. Bureau of Prisons (BOP) records appear to
17 show Defendant receiving credit for time served in federal custody for the
18 period from June 10, 2015 through September 21, 2015. (ECF No. 52 at p. 26).

19 This court's record reflects that Magistrate Judge Rodgers issued an arrest
20 warrant for Defendant on March 19, 2015, which was executed on the same day.
21 (ECF Nos. 3 and 4). Defendant had an initial appearance on March 20, 2015, at
22 which the Defendant was ordered detained pursuant to motion filed by the
23 Government. (ECF No. 9). It appears Defendant was arrested on March 14 and
24 initially taken into state custody. The Spokane County Superior Court docket
25 for Cause No. 15-1-01025-6 shows that a "Notice of Arrest" was filed on March

26 ///

27 **ORDER GRANTING**

28 **28 U.S.C. §2255 MOTION-**

1 16 and Defendant made a preliminary appearance in that court on March 17.
2 See <http://www.dw.courts.wa.gov>.

3 At this juncture, the court has no firm basis to take issue with BOP's
4 calculation of credit for time served in federal custody prior to imposition of
5 sentence by this court on September 22, 2015. In the absence of compelling
6 information to the contrary, this court must give the benefit of the doubt to BOP
7 which is entrusted with calculating credit for time served in federal custody.
8 The Amended Judgment will reflect that Defendant should receive credit for
9 time served which may prompt BOP to re-examine what that credit should be.²

10 **D. CONCLUSION**

11 Defendant's 28 U.S.C. §2255 Motion (ECF No. 52) is **GRANTED** and
12 the District Executive is directed to enter an Amended Judgment in accordance
13 with this order.

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17 _____
18 ² The Judgment entered by the Spokane County Superior Court indicates
19 Defendant received credit for 91 days served in state custody prior to imposition
20 of sentence on November 13, 2015. (ECF No. 52 at p. 18). This presumably
21 includes the 41 days Defendant spent in state custody between September 23,
22 2015 and November 13, 2015, following his September 22, 2015 sentencing in
23 federal court. That leaves 50 days credit which is presumably for time spent in
24 state custody between March 14, 2015 and June 10, 2015. That, however, does
25 not account for the entire 88 days encompassed by those two dates. While there
26 may be a rational explanation, this court seemingly cannot account for 38 days
27 between March 14, 2015 and November 13, 2015.

28 **ORDER GRANTING**

28 U.S.C. §2255 MOTION-

s/Lonny R. Suko

ORDER GRANTING
28 U.S.C. §2255 MOTION- **6**